APPENDIX "A"

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C. 20543

May 18, 1970

RE: SULLIVAN v. CHOQUETTE, ET AL.,
No. 1345, Oct. Term, 1969

Dear Sir:

The Court today denied the petition for a writ of certiorari in the above-entitled case.

Very truly yours,

John F. Davis, Cle
By
E. L. Wheeler
Assistant Clerk

Mr. James D. Sullivan,
50 Central Ave.
Ocean, City, NJ. 08226

United States Court of Appeals
For the First Circuit

No. 7404.

JAMES D. SULLIVAN,
PLAINTIFF, APPELLANT,
v.
EDWARD J. CHOQUETTE,
JONATHAN G. WELLS III,
HARVEY BEIT
and
T. FRANCIS KELLEHER,
DEFENDANTS, APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before ALDRICH, *Chief Judge*,
McENTEE and COFFIN, *Circuit Judges*.

James D. Sullivan pro se.
Benjamin Goldman for Edward J. Choquette et al., appellees.
David S. Mortensen, with whom *John Kimball, Jr.*, and *Hale and Dorr* were on brief, for Johnathan G. Wells et al., appellees.

December 30, 1969.

PER CURIAM. This is an action for malicious prosecution, abuse of process and for relief from a judgment of eviction of the Newburyport District Court of Massachusetts.[1] Our jurisdiction is invoked under the civil rights

[1] This litigation has had a long history in the federal courts. Plaintiff first sued defendant Kelleher for damages for an alleged deprivation of his constitutional rights in that Kelleher, as clerk of the state court, entered a default judgment against him in the eviction action with knowledge that legal notice of the suit had not been

provisions, 28 U.S.C. § 1343 (1964) and 42 U.S.C. §§ 1983, 1985 (1964), and the diversity statute, 28 U.S.C. § 1332 (1964). Plaintiff appeals from the dismissal of his complaint by the district court, for, inter alia, failure to state a claim upon which relief can be granted. The essential facts are set out in the district court's opinion in *Sullivan I, supra,* note 1.

It is plain that an action for malicious prosecution will not lie unless there has been a termination of the prior proceedings in a manner favorable to the plaintiff. *Dangel* v. *Offset Printing, Inc.*, 342 Mass. 170 (1961); W. Prosser, Torts §§ 113-14 (3d ed. 1964). As the judgment of eviction rendered by the state court still stands, plaintiff has no cause of action unless relief is granted against that judgment. Hence, we proceed to consider that aspect of the case.

Plaintiff claims that service of process in the eviction action was constitutionally defective, that the state court therefore did not have jurisdiction, and that we should grant a "writ of error" to the state court, reversing or vacating the judgment. While we do not have the power to "annul, vacate, correct or otherwise alter the prior judgment" of a state court, we do have equitable jurisdiction

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given. That action was dismissed by the district court on grounds of judicial immunity and we affirmed. *Sullivan* v. *Kelleher*, 405 F.2d 486 (1st Cir. 1968). He next brought suit for breach of the lease of the premises from which he was evicted, abuse of process, and slander against defendants Choquette and Wells and one Jean MacDonald. The district court granted summary judgment for the defendants on all three counts. *Sullivan* v. *Choquette*, 289 F.Supp. 780 (D. Mass. 1968), *appeal dismissed for want of prosecution*, No. 7253 (1st Cir., Feb. 21, 1969) [hereinafter cited as *Sullivan I*].

To the extent that this action states a claim for abuse of process, the district court was correct in dismissing it. Such a claim is plainly concluded by the decision in *Sullivan I* as well as barred by the statute of limitations. Moreover, the dismissal of the complaint as to defendant Kelleher was clearly proper, as his immunity from suit was conclusively determined by our decision in *Kelleher, supra.*

jurisdiction is invoked under the civil rights provisions, 28 U.S.C. §1343 (1964) and 42 U.S.C. §§1983, 1985 (1954), and the diversity statute, 28 U.S.C. §1332 (1964). Plaintiff appeals from the dismissal of his complaint by the district court, for, inter alia, failure to state a claim upon which relief can be granted. The essential facts are set out in the district court's opinion in *Sullivan I, supra,* note 1.

It is plain that an action for malicious prosecution will not lie unless there has been a termination of the prior proceedings in a manner favorable to the plaintiff. *Dangel* v. *Offset Printing, Inc.,* 342 Mass. 17 (1961); W. Prosser, Torts §§113-14 (3rd ed. 1964). As the judgment of eviction rendered by the state court still stands, plaintiff has no cause of action unless relief is granted against that judgment. Hence, we proceed to consider that aspect of the case.

Plaintiff claims that service of process in the eviction action was constitutionally defective. that the state court therefore did not have jurisdiction, and that we should grant a "writ of error" to the state court, reversing or vacating the judgment. While we do not have the power to "annul, vacate, correct or otherwise alter the prior judgment" of a state court, we do have equitable jurisdiction to grant relief from the effects of such a judgment in an appropriate case.[2] 7 J. Moore, Federal Practice ¶60.36 (2nd ed. 1968). This is not, however, such a case.

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[2] Equitable relief against the state judgment, under some circum-

Service of process in the state case was made by leaving the writ at the demised premises in accordance with Mass. G.L.A. ch. 223, §31. Plaintiff received actual notice of service from his wife, who informed him of the contents of the writ over the telephone. In actions concerning rights in property within the state, due process requires only that reasonable notice and an opportunity to be heard be afforded. *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950); F. James, Civil Procedure §§12.1, 12.7, 12.11 (1965); Restatement of Judgments §32, comments a, f, and g (1942); see *Wagner* v. *Wagner*, 293 F.2d 533 (D.C. Cir. 1961); *Schultz* v. *Walker*, 130 F.2d 907 (7th Cir. 1942). While some commentators have expressed doubts as to the constitutionality of service made by simply leaving process at the last and usual place of abode, the doubts have concerned the likelihood of the defendant not receiving actual notice of the action. James, *supra* §12.11, at 650-51. Since plaintiff in this case had actual notice, we find no defect in the service of process. The district court was therefore correct in dismissing this aspect of the complaint for failure to state a claim and, since there has not been a favorable termination of the state eviction proceeding, the court was also correct in dismissing the malicious prosecution count.

Affirmed.

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stances, could arguably constitute a favorable termination of the prior suit for purposes of bringing an action for malicious prosecution. Since we do not grant relief against the state judgment, however, we express no opinion on the merits of this issue.

APPENDIX "C"

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS
CIVIL ACTION NO. 68-983-G
Civil Action No. 68-983-G

JAMES D. SULLIVAN,

PLAINTIFF

v.

EDWARD J. CHOQUETTE ET AL.,

DEFENDANTS

MEMORANDUM OF DECISION
AND ORDER OF DISMISSAL

May 27, 1969

GARRITY, J. This case arises upon plaintiff's complaint against four individual defendants brought for the stated purpose of effecting reversal of a writ of summary process entered by the Newburyport District Court and for damages allegedly arising from the fraudulent issuance and procurance of the writ. The court presently has before it various motions, including motions by each defendant to dismiss the complaint and a motion by the plaintiff for summary judgment on defendant Kelleher's counterclaim for an order enjoining plaintiff from bringing additional suits arising from the transaction at bar.

The facts upon which this complaint is premised have been before this court twice previously[1] and are reported in *Sullivan* v. *Choquette*, D. Mass., 1968, 289 F.Supp. 780. For the purposes of consideration of the defendant's

[1] In *Sullivan* v. *Kelleher*, Civil Action No. 67-919-C, defendant's motion to dismiss was allowed on June 26, 1968, on the ground that defendant was judicially immune. The judgment was affirmed, *Sullivan* v. *Kelleher*, 1 Cir., 1968, 405 F.2d 486.

In *Sullivan* v. *Choquette*, Civil Action No. 67-961-C, defendants' motions to dismiss were allowed on September 30, 1968, reported at 289 F.Supp. 780. Appeal docketed, No. 7253, 1 Cir., was dismissed for lack of prosecution on February 21, 1969.

presently pending motions, the facts alleged by the resisting party are, of course, assumed to be true.

I

Each defendant asserts multiple grounds in support of his motion for dismissal. Since the motions must be granted, only some of these grounds need be specifically discussed by the court.

1. *Statute of Limitations.* All defendants have moved to dismiss on the ground that the statute of limitations has run. This suit, whether in tort or for violation of the Civil Rights Act, 42, U.S.C. §§1983, 1985 and 1986, is governed by the applicable Massachusetts statute of limitations. The most analogous and applicable Massachusetts statute of limitations is that of Mass. G.L. c. 260, §2A, which provides a two-year limitation for all but certain specified actions which are not related to that at bar. Cf. *Mulligan* v. *Schlachter,* 6 Cir., 1968, 389 F.2d 231, *Henig* v. *Odorioso,* 3 Cir., 1967, 385 F.2d 491, cert. den. 390 U.S. 1016, rehearing den. 391 U.S. 929. Since the last of the defendants' acts complained of took place not later than February 4, 1966, this suit, which was filed on October 30, 1968, is barred by the statute of limitations.

2. *Judicial immunity.* Defendant Kelleher has moved to dismiss on the ground of judicial immunity. All of Kelleher's acts which are complained of where acts within the scope of his duties as clerk of the Newburyport District Court. Kelleher is therefore immune from suit on the ground of judicial immunity. *Sullivan* v. *Kelleher,* 1 Cir., 1968, 405 F.2d 486.

3. *Res judicata.* Each defendant has moved to dismiss on the ground of res judicata. The facts recited in the complaint in this case are identical to those in two suits in this court previously brought by plaintiff and dismissed.[2] Each defendant in this case was a defendant in one of those

[2] See footnote 1 above.

two cases except defendant Beit, who is joined here solely as a law partner of defendant Wells and who is not alleged to have otherwise been involved. The previous suit against defendant Kelleher (C.A. No. 67-919-G) was premised both in tort and under the Civil Rights Act of 1871, as is this case, and is therefore res judicata on all issues raised in this case against defendant Kelleher. The previous suit against defendants Choquette and Wells (C.A. No. 67-961-C) was brought in tort with jurisdiction based upon diversity of citizenship; that suit did not claim a cause of action under the Civil Rights Act of 1871. To the extent that plaintiff's claim is in tort for malicious prosecution or abuse of process, the judgment in that case (C.A. No. 67-961-C) is res judicata since it involves the identical cause of action and facts. Restatement of Judgments §50 (1942); 1B, Moore, Federal Practice, Para. O.409(1) at 1005 (2nd ed. 1965). Plaintiff's claim against defendant Beit is barred to the same extent that it is against defendants Choquette and Wells by C.A. 67-961-C since his alleged involvement in a malicious prosecution or abuse of process is no more than derivative from that of defendant Wells. The remainder of this suit, plaintiff's claim under the Civil Rights Act of 1871 that defendants Choquette, Wells and Beit have by conspiracy prevented plaintiff from receiving due process of law in courts of the Commonwealth of Massachusetts, is of the same purport and substance as plaintiff's prior suit for malicious prosecution and abuse of process (C.A. 67-961-C) and therefore is also barred under the doctrine of res judicata. See *Mendez* v. *Bowie*, 1 Cir., 1941, 118 F.2d 435; see also 1B, Moore, Federal Practice, Para. O.409(1) at 1005-1008 and Para. O.410(1) and (2) at 1151-1184 (2nd ed. 1965); Developments in the Law—Res Judicata, 65 Harv. L. Rev. 826-828.

4. *Failure to state a cause of action.* Plaintiff's complaint alleges that the defendants have conspired and act-

ed under the color of law to deprive plaintiff of his civil rights. "State proceedings do not become civil rights matters by generalized, not to mention unsupported, allegations . . . " *Ronan* v. *Stone*, 1 Cir., 1968, 396 F.2d 502, 503. There is in this complaint no statement of a claim as required by Fed. R. Civ. P. 8 to support plaintiff's allegation of a denial of his civil rights. Plaintiff's complaint, therefore, fails to state a cause of action upon which relief may be granted.

II

In view of the allowance of defendants' motions to dismiss, the motion of defendant Wells to dissolve attachment is granted, all other motions pending in this case are denied, and defendant Kelleher's counterclaim is dismissed for want of independent jurisdiction. Cf. *Strachman* v. *Palmer*, 1 Cir., 1949, 177 F.2d 427; see also *United Mine Workers* v. *Gibbs*, 1966, 383 U.S. 715.

So ordered.

(s) W. Arthur Garrity, Jr.
United States District Judge

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 7404.

JAMES D. SULLIVAN,
PLAINTIFF, APPELLANT
v.
EDWARD J. CHOQUETTE,
JONATHAN G. WELLS III,
HARVEY BEIT
and
T. FRANCIS KELLEHER,
DEFENDANTS, APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before ALDRICH, *Chief Judge,*
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James D. Sullivan pro se.
Benjamin Goldman for Edward J. Choquette et al., appellees.
David S. Mortensen, with whom *John Kimball, Jr.*, and *Hale and Dorr* were on brief, for Jonathan G. Wells et al., appellees.

December 30, 1969

PER CURIAM. This is an action for malicious prosecution, abuse of process and for relief from a judgment of eviction of the Newburyport District Court of Massachusetts.[1] Our

[1] This litigation has had a long history in the federal courts. Plaintiff first sued defendant Kelleher for damages for an alleged deprivation of his constitutional rights in that Kelleher, as clerk of the state court, entered a default judgment against him in the eviction action with knowledge that legal notice of the suit had not been given. That action was dismissed by the district court on grounds of judicial immunity and we affirmed. *Sullivan* v. *Kelleher*, 405 F.2d

APPENDIX "D"

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 7253

JAMES D. SULLIVAN

Plaintiff-Appellant

vs

EDWARD J. CHOQUETTE ET AL.

Defendants-Appellees

ORDER OF THE COUR

entered Feb. 21, 1969 Filed Feb. 21, 1

Plaintiff-appellant having taken no action in response to a motion of his counsel to withdraw or to respond by Feb. 17, 1969 to his duty to proceed in this court, and not having responded to motions of appellees to dismiss, file Feb. 4 and 14 respectively, for failure to prosecute diligently his appeal in which his attention was specifically called to his obligations and lack of interested counsel,

It is hereby ordered that the appeal herein be, and the same hereby is, dismissed for lack of prosecution.

By the Court

Roger A. Stinefield
Clerk